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NO. 93-1024

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

AMERADA HESS CORPORATION, ET AL.,

Petitioners,

v

OWENS-CORNING FIBERGLAS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION OF RESPONDENT, OWENS-CORNING FIBERGLAS, INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Alabama Supreme Court's decision should be subjected to discretionary review on Writ of Certiorari in light of the following factors:

A. In the absence of a controlling opinion from the United States Supreme Court, the Alabama Supreme Court is not bound by decisions of lower federal courts;

B. The rule of law adopted by the Alabama Supreme Court advances both the goal of uniformity and the aims of admiralty law in relation to contribution from settling tortfeasors;

C. The decision of the Alabama Supreme Court is not in conflict

with the decision of the Eleventh Circuit Court of Appeals in Great Lakes in that the Eleventh Circuit's opinion was based on a singular set of circumstances and an apparent misapprehension of the law from the Fifth Circuit and from the Supreme Court in Edmonds v. Compagnie General Trans-Atlantique?

2. Whether the Petitioners can maintain non-contractual maritime claims for indemnity against third-party defendants?

3. Whether, if the Court decides that review should be granted, the Alabama Supreme Court's decision is a useful guide in balancing competing interests?

LIST OF PARTIES

Respondent agrees that the list of parties set out by Petitioners is complete and correct.

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CITATIONS TO OPINIONS BELOW

Respondent agrees with the citations set out by Petitioners as to the opinions and judgments delivered by the Alabama Supreme Court and the lower courts.

STATEMENT OF GROUNDS FOR JURISDICTION

The Respondent agrees with the Petitioners' statement of the grounds for jurisdiction. The Respondent agrees that jurisdiction of the court is invoked under 28 U.S.C. § 1257 or § 1333.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Similarly, Respondent agrees with the Petitioners' statement of involvement of the United States Constitution, Art. VI, Cl. 2 and the aforementioned United States Code sections.

STATEMENT OF THE CASE

Respondent agrees in general with the factual statements by Petitioners but denies all argumentative inserts. Specifically, Respondent states as follows:

Respondent denies that review is warranted because the Alabama Supreme Court's decision at issue here is in conflict with any controlling precedent from this Court. Despite Petitioners statement, decisions of the Fourth Circuit do not constitute precedent for the Supreme Court of Alabama. Also, in this case, as will be shown, no "precedent" from the Eleventh Circuit Court of Appeals is applicable to the Supreme Court of Alabama.

The Alabama Supreme Court's decision promotes the uniform application of admiralty law in those situations where the

right of contribution is circumscribed by rights of settling parties.

The Respondent would further note that the trial court granted Respondent summary judgment based on prior settlements between the plaintiffs and third party defendants. The pro-tanto releases filed in support of each summary judgment motion contained the following contractual indemnity language:

> In consideration for the payment of the aforesaid sum, the plaintiffs...agree to and do hereby indemnify and hold harmless OCF from any and all liability for the payment of damages by reason of any claim awarded by any person, firm, corporation or entity against OCF for indemnity or contribution as a result of any claim, demand, settlement, judgment or payment made to the plaintiffs...arising out of any injuries, disease, damages or death to decedent or loss of consortium or other damages to plaintiffs.

SUMMARY OF ARGUMENT

This case does not demonstrate those "special or important reasons" for the exercise of the Court's discretion in granting a review on Writ of Certiorari. The decision under consideration is a well-reasoned opinion which, considering the choices available to the Alabama Supreme Court, best advances the goal of uniformity and the balance of competing interests in admiralty law. To the extent that the admiralty law itself is not firmly settled in this area, as shown by the comments found after the Restatement (Second) of Torts, § 886A, Comment m, set out in the appendix of Petitioners, the Alabama Court's decision is no more in conflict with Federal Circuit decisions than all other decisions rendered by courts which have dealt with this issue.

The available options relating to settlement are limited. They stem from the three options set out in the Restatement (Second) of Torts § 886A referenced above. In an opinion of the Alabama Supreme Court rendered in Foster-Wheeler vs. Owens Illinois, 595 So.2d 439 (Ala. 1992), the court interpreted these options to be as follows:

> (I) The money paid extinguishes any claim that the injured party has against the party released and the amount of his remaining claim against the other tortfeasor is reached by crediting the amount received; but the transaction does not affect a claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation...
>
> (II) The money paid extinguishes both any claims on the part of the injured party and any claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation and seeks contribution.
>
> (III) The money paid extinguishes any

> claim that the injured party has against the released tortfeasor and also diminishes the claim that the injured party has against the other tortfeasors by the amount of the equitable share of the obligation of the released tortfeasor.

595 So.2d 442. (Emphasis in original.)

Faced with these three options, the Alabama Supreme Court, in a closely-reasoned opinion, chose Option Number III. The decision, sub judice, cannot unequivocally be said to be in conflict with the Eleventh Circuit's opinion in Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER, 957 F.2d 1575, 1582 (11th Cir.) cert. denied, _____ U.S. _____, 113 S. Ct. 484 (1992).

In Great Lakes, the Eleventh Circuit was not writing "on a clean slate" as found by the Supreme Court of Alabama. Furthermore, the Great Lakes court misapprehended the effect of the controlling

precedent in Edmonds v. Compagnie Generale Trans-Atlantique, 443 U.S. 256, 99 S.Ct. 2753 (1979). Based on that misapprehension, the Eleventh Circuit limited the reach of Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979) which should have constituted the court's true precedent.[1]

In addition, certiorari should not be granted because the foundations on which Petitioners claim the right to make their third-party claims are suspect. Petitioners have no right to make non-contractual third-party claims for indemnity and the claims for contribution must be circumscribed by the rights of the settling parties.

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[1] Initially, the Eleventh Circuit acknowledged it was bound by Leger because of Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) adopting Fifth Circuit case law.

Therefore, in view of the history of the admiralty law in this area and the benefit of the Alabama Court's ruling in steadying this issue, this Court should deny the Shipowners' Petition for Writ of Certiorari to the Alabama Supreme Court.

ARGUMENT

I.

WHETHER THE ALABAMA SUPREME COURT'S DECISION SHOULD BE SUBJECTED TO DISCRETIONARY REVIEW ON WRIT OF CERTIORARI

The case sub judice is not one which presents special or important reasons for granting certiorari. It is simply a case involving a settling, alleged joint tortfeasor in admiralty. The Alabama Court, free to choose, chose one of a limited number of options. This occurs daily in admiralty cases involving multiple defendants. The decision should not be read to be in conflict with the decision of the Eleventh Circuit in Great Lakes because circumstances differed between these two cases.

The Alabama Court's decision involves an interpretation of the federal common law

in the area of admiralty and the Alabama Supreme Court's ruling fosters the emerging majority trend in that common law.

A. The Supreme Court has not ruled and the Alabama Supreme Court is not bound by the decisions of lower federal courts.

In Miller v. Christopher, 887 F.2d 902 (9th Cir. 1989), the court summed up the state of the law concerning settlements in multi-defendant admiralty cases: "We sympathize with the District Court's difficulties in finding guidance from controlling authority on the settlement bar issue. There is none." Id at 903. The Miller court also stated: "The problem that...we face in this case has not been directly addressed by any Supreme Court case, since none of the Court's decisions have involved a settlement and release by one wrongdoer.

The parties to this appeal, and several lower federal courts, have recognized that the policies behind these presently well-established admiralty principles...do not clearly point to one result concerning the wisdom of a settlement bar." Id at 904.

Respondent would note that the Miller court, in reviewing the options chosen by other courts, did not find one prior to Great Lakes that had adopted Option I - allowing claims of contribution against settling parties. The Eleventh Circuit, alone, does not bar contribution claims against settling parties.

In Ballew v. State, 296 So.2d 206 (Ala. 1974), cert. denied 419 U.S. 1130, 95 S.Ct. 816 (1975), the Alabama Supreme Court held that decisions of federal courts other than the Supreme Court of the United States are

not binding upon a state court of last resort.

That view corresponds with the view of most commentators:

> (3) *Where there is conflicting federal authority on the issue presented.*
>
> The state courts should choose that precedent which they believe to be most likely to produce the result which the federal program is aimed to achieve. This calls for a thorough examination of the purposes of the federal program and an examination of all relevant federal precedent to determine the trend of federal law in this area. Note, The State Courts and the Federal Common Law, 27 Alb. L.Rev. 73,82 (1963).

In light of the absence of controlling precedent from the United States Supreme Court, the Alabama Supreme Court was free to follow that "precedent which they believe to be most likely to produce the result which the federal program is aimed to achieve." In

choosing Option III and enforcing a settlement bar, the Alabama Court did put itself with the majority of courts reviewing this issue.

B. The Rule of Law adopted by the Alabama Court advances both the goal of uniformity and the aims of the admiralty law.

The Alabama Supreme Court made clear that it thought the decision at issue was best to accomplish the purposes of admiralty law. The Court was aware of but chose to distinguish the Eleventh Circuit's ruling in Great Lakes. In the opinion, the Alabama Court set out at length the rationale and foundation of its decision, a rationale more compelling than that of Great Lakes.

The Court stated as follows:

"Because this Court's understanding of Option III and

Leger differs fundamentally from the construction offered by the Eleventh Circuit, we see no tension between Option III and maritime law such as was expressed in the Ebanks-Self-Great Lakes[2] trilogy. On the contrary, this approach appears to represent the most efficient method of accommodating the policies of federal and maritime law. As discussed above, the reduction in a plaintiff's claim by the pro

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[2] Ebanks v. Great Lakes Dredge and Dock Company, 688 F.2d 716 (11th Cir. 1982), cert. denied, 460 U.S. 1083 (1983)

Self v. Great Lakes Dredge and Dock Company, 832 F.2d 1540 (11th Cir. 1987), cert. denied, 486 U.S. 1033 (1988)

rata method of Option III is as likely to inure to the plaintiff's benefit as a pro-tanto reduction, which obtains pursuant to Options I and II, and it does not seem unreasonable to require the plaintiff to forgo that portion of his claim represented by the pro rata fault of the tort-feasor with which he voluntarily settled. A pro rata reduction in the plaintiff's total claim also prevents unfairness to the non-settling tort-feasors that can occur under Option II's pro-tanto reduction, which 'allows the plaintiff, in effect to 'repudiate' his bargain since he can be made whole out of the

pockets of the non-settling tortfeasors.' T. Schoenbaum, Admiralty and Maritime Law § 4-15, at 26 (Supp. 1992). Indeed, allocation of damages based on the settling tort-feasor's pro rata share of fault obviates the need for contribution to non-settling tort-feasors. Id.

The application of Option III, which, unlike Option I, recognizes the finality of a settlement, also accommodates the policy of the federal courts favoring settlements. See Fed. R. Civ. P. 68; Marek v. Chesny, 473 U.S. 1, 12-13 (1985) (Powell, J., concurring); Williams v. First Nat'l Bank, 216 U.S. 582, 595

(1910) ("Compromises of disputed claims are favored by the courts."); see also Stanley v. Bertram-Trojan, Inc., 781 F. Supp. 218, 222 (S.D.N.Y. 1991).

Moreover, allowing contribution from settling tort-feasors could subject plaintiffs to liability for damages and expenses recovered by non-settling defendants from settling defendants. For example, the settlement agreements involved in this case contained the following provision:

> 'In consideration for the payment of the aforesaid sum, the Plaintiffs ... agree to and do hereby indemnify and hold harmless OCF from any and all liability for the payment of damages by reason of any claim asserted by any

> person, firm, corporation or entity against OCF for indemnity or contribution as a result of any claim, demand, settlement, judgment or payment made to the Plaintiffs or their representatives, heirs or assigns, arising out of any injuries, disease, damages or death to decedent or loss of consortium or other damages to Plaintiffs.'
>
> (Emphasis added.) Based on this indemnity provision, OCF has stated its intention to pursue its rights and remedies against the plaintiffs in the event the shipowners' claims against it are successful."

Opinion pages 37-40, Appendix of Petitioners. (Emphasis added in part.)

Obviously, the right to contribution, which is not denied by any party hereto, is somewhat limited by competing rights of settling parties in two out of the three

possible options. Only Option I leaves contribution as an unfettered right in a settlement situation; and, after a thorough-going analysis, the Alabama Supreme Court chose not to adopt Option I because that was believed to frustrate rather than promote the goals of federal law.

C. The Alabama Supreme Court's decision should not be read to be in conflict with the Eleventh Circuit's decision in Great Lakes

The earliest case to discuss the issue of comparative fault where one or more defendants have settled was Leger v. Drilling Well Control, Inc., supra. There the Fifth Circuit, interpreting United States v. Reliable Transfer Co., 421 U.S. 397, 95 S.Ct. 1708 (1975) in conjunction with Cooper Stevedoring v. Fritz Kopke, Inc., 417 U.S. 106, 94 S.Ct. 2174 (1974),

decided that the nonsettling defendant who went to verdict was entitled to a reduction of the verdict amount based upon the settling tortfeasor's proportionate fault. This proportionate reduction was viewed as the only option available under the requirements of Reliable Transfer.

Four years after Reliable Transfer, the Supreme Court decided Edmonds v. Compagnie Generale Trans-Atlantique, supra. There the Court applied the traditional tort principles of joint and several liability. This appeared to mean that after these two cases, a plaintiff obtaining judgment against joint tortfeasors might choose to seek full satisfaction from either one regardless of comparative fault. The doctrine of contribution would allow the appropriate adjustment of damages to achieve

liability based on proportionate fault, however, there was no clear answer in the case of one or more defendants settling before verdict.

The Eleventh Circuit in Great Lakes was not writing on a clean slate because it carried the baggage of earlier rulings in the closely-related cases of Self and Ebanks, supra. The Eleventh Circuit started the trilogy by adopting Option II and effecting a settlement bar to contribution claims and ended by adopting Option I and proscribing a settlement bar. The reason appears to be that the Eleventh Circuit always believed that Option III, as applied in Leger, modified the principle of joint and several liability, as mandated in Edmonds, among nonsettling tortfeasors. This is not the case.

In Self, the Eleventh Circuit held that plaintiff was entitled to recover her entire damages regardless of the nonsettling defendant's percentage of fault with only a dollar for dollar credit being given for the settlement dollars paid by the settling defendant. This appeared to be the pro-tanto approach of Option II including a settlement bar to claims of contribution. The Eleventh Circuit in Great Lakes, subsequently reversed itself claiming that its holding in Self was dicta[3].

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[3] The dicta misled a number of commentators and courts: e.g., Miller v. Christopher, Supra, Associated Electric Co-Op v. Mid-America Transp., 931 F.2d 1266 (8th Cir. 1991), Owen and Whitman, Fifteen Years Under Reliable Transfer, 22 J.Mar.L.&Com. 445 (1991), Commentary, The Conflicting Doctrines of Self and Leger; The Unsettling Uncertainty of Settlement in Admiralty, 41 Ala. L. Rev. 471

The Great Lakes ruling misapprehended the effect of Edmonds on Leger when it concluded that Edmonds weakened Leger's effect as a precedent. As the Alabama Supreme Court said, "We might be inclined to agree with the approach thus adopted by the Eleventh Circuit if its analysis of Leger...[was] sound. We conclude, however, that the opposite is true." Opinion at pg. 35, Appendix of Petitioners.

The Alabama Supreme Court noted that the Eleventh Circuit felt itself bound by its earlier ruling that the Self "pro-tanto" approach had overruled Leger's "pro rata" approach and the Circuit Court believed it was limited to only Option I or II.

The Alabama Supreme Court stated:

(1990).

> The [Eleventh Circuit's] analysis proceeded upon the premise that Option III as applied in Leger abrogated or modified joint liability among nonsettling tort-feasors. Such an approach would relieve nonsettling tort-feasors not only of the liability represented by the pro rata share of settling tort-feasors, but also of liability represented by the pro rata shares of the nonsettling tort-feasors, thus requiring the plaintiff to bear the risk, for example, of a nonsettling tort-feasor's insolvency. Such an approach would, indeed, contravene the policy of maritime law...
>
> Nothing in the text of the Restatement, however, or, for that matter, Leger, requires this result. Significantly, the Fifth Circuit has recently declared expressly that Leger did not "eliminate the well established maritime rule of joint liability."...Option III, therefore, does not prevent a maritime plaintiff from recovering all his damages -- minus an amount represented by the settling tort-feasor's percentage of fault -- from any of the nonsettling tort-feasors. As among those tort-feasors, contribution provides the vehicle through which an equitable distribution of damages may be achieved.

Opinion, pages 35-37, Appendix of

Petitioners. (Emphasis in original, citations omitted.)

The Alabama Supreme Court had not constrained itself with a ruling similar to Self and was not obligated to continue paying homage to a faulty line of reasoning. If the Eleventh Circuit was freed of the peculiar limitations and misapprehensions in the trilogy of cases, the decision in Great Lakes might have been identical to the instant decision.

ARGUMENT

II

WHETHER THE PETITIONERS CAN MAINTAIN NON-CONTRACTUAL MARITIME CLAIMS FOR INDEMNITY AGAINST THIRD-PARTY DEFENDANTS

There have been three types of indemnity traditionally recognized in the law of admiralty: active-passive negligence, indemnity based on a breach of the implied duty of workmanlike performance as stated in Ryan Stevedoring Company v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956), and contractual indemnity. It appears that only contractual indemnity has survived unquestioned following the adoption of the comparative fault rule in Reliable Transfer. See generally, T. Schoenbaum, Admiralty and Maritime Law §4-15. In Reliable Transfer, the court removed the last vestiges of an earlier doctrine called "divided damages"

which required damages stemming from an accident to be equally allocated between parties causing the accident regardless of the respective degrees of fault. The court looked to more modern principles of comparative negligence in abandoning the old rule.

The petitioners below argued only indemnity based on active-passive negligence. Any claim of indemnity based on Ryan was not presented or distinguished as petitioners attempt to do here. In fact, the Alabama Supreme Court framed petitioners' indemnity argument below as follows: "The Shipowners contend that OCF's conduct in supplying asbestos-containing products for shipboard use was 'actively' wrongful, while their fault consisted, they contend, only in failing to discover the danger of asbestos--

conduct that they insist was only 'passively' wrongful." Opinion at page 5, Appendix of Petitioners.

The Alabama Supreme Court went on to hold that an admiralty defendant's reliance on the active-passive fault doctrine was misplaced after Reliable Transfer. Id. at 7.

Apparently, the petitioners, having been rebuffed below, have reformulated their argument and now ask this Court to grant certiorari based on an argument not made to the Alabama Supreme Court. In other words, Petitioners are asking for a review of an issue that was not reviewed below.

The Petitioners cited Vaughn v. Farrell Lines, Inc., 937 F.2d 957 (4th Cir. 1991) below, but it was only to support their argument based on an "active-passive" indemnity. Indeed, Vaughn was decided on an

active-passive basis and is inapplicable to support some new theory of Ryan indemnity. As here, Vaughn below was the Petitioners' sole authority for indemnity claims, but it should be noted that Vaughn does not discuss Reliable Transfer or any cases coming after Reliable Transfer establishing a proportional fault or comparative negligence scheme. It only discusses indemnification and the cases it cites, given the changes in admiralty law, are not compelling. If anything, Vaughn stands as a derelict in the harbor of admiralty law, posing danger for the unwary in the Fourth Circuit. Vaughn was never shown to be applicable in the Alabama Supreme Court and, in fact, that court expressly rejected its holding.

ARGUMENT

III

IF THIS COURT ELECTS TO REVIEW, THE ALABAMA SUPREME COURT OPINION IS A USEFUL GUIDELINE FOR BALANCING COMPETING INTERESTS

Should this Honorable Court decide on review by Writ of Certiorari to the Alabama Supreme Court, the opinion of that court should be carefully considered. The Alabama Supreme Court went to great lengths in deciding on an appropriate mechanism for handling claims of contribution in the situation where one or more alleged joint tortfeasors settle with the plaintiff.

The Alabama Court considered the issues of fairness to the parties to the underlying litigation as well as the aims and expectations of the admiralty law. Although some differences did exist between the circuits on this issue, none were glaring

until the Eleventh Circuit's ruling in Great Lakes.

The Alabama Supreme Court's decision puts it in the majority of courts which have considered this issue. Its insights on the Eleventh Circuit's rulings in the trilogy of cases ending in Great Lakes are most valuable in showing that those decisions are based on faulty analysis and, hence, should be of little precedential worth.

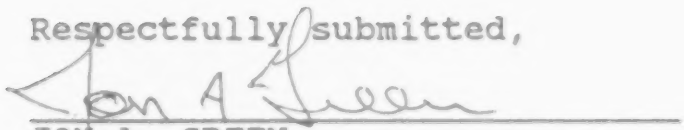
The Alabama Court's reasoning concerning the best option to choose should also be of use to the court because it leaves intact the foundation stones of right to contribution between nonsettling tortfeasors and joint and several liability as among nonsettling tortfeasors.

CONCLUSION

For the reasons set forth above, Petitioners, in the circumstances of this case, have failed to show a clear conflict with the circuits or that special or important reasons exist for review of this case on Writ of Certiorari to the Alabama Supreme Court.

WHEREFORE, the Respondent, Owens-Corning Fiberglas, Inc., respectfully prays that the Petition for Writ of Certiorari to the Alabama Supreme Court be denied.

Respectfully submitted,



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